A

HARI BHADUR GHALE

v.

PP

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
SURIYADI HALIM OMAR FCJ
ZALEHA ZAHARI FCJ
C JEFFERY TAN FCJ
[CRIMINAL APPEAL NO: 05-14-2011(W)]
25 SEPTEMBER 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Trafficking - 875.2*
D *grams of heroin - Conviction and sentence - Appeal against - Agent provocateur's role in arrest*

EVIDENCE: *Agent provocateur - Admissibility of evidence - Dangerous Drugs Act 1952, s. 40A - Interpretation of s. 40A(2) - Categories of*
E *agent provocateur - Whether limited to police and customs officer only - Limbs of s. 40A(2) - Whether agent provocateur can claim benefit under s. 40A(2)*

As a result of a cooperation between the Malaysian Police and the United States Drugs Enforcement Agency ('DEA'), the appellant
F was arrested and subsequently charged under s. 39B of the Dangerous Drugs Act 1952 ('DDA') read together with s. 34 of the Penal Code, for the offence of trafficking in 875.2 grams of heroin. SP4, who worked for DEA, played the key role in the appellant's arrest by acting as an agent provocateur. The appellant
G was convicted and sentenced to death by the High Court. Hence, the appellant appealed. In the present appeal, the main issue for the court's determination was regarding the interpretation of s. 40A of the DDA and in particular, sub-s. (2) thereof. Learned counsel for the appellant contended that only two categories of
H agent provocateurs were recognised under s. 40A(2) of the DDA and they are police and custom officers. It was submitted that SP4 cannot claim benefit to s. 40A(2) of the DDA as his identity was questionable and he was neither a police nor a customs officer within the meaning of s. 40A(2) of the DDA.

I

Held (dismissing the appeal; affirming conviction and sentence)

Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) Subsection (1) of s. 40 of the DDA acts as a variation or exception. It is to remove or minimise the impact of the presumption of credit unworthiness as a witness against an agent provocateur. Such presumption could otherwise be invoked under the general rules of evidence and procedure in view of the role that he might have played in the commission of the offence in question. Without the sub-section, a trial judge might exclude such evidence on the basis of it being prejudicial to the accused, or even if admitted, he might give little or no weight to the evidence upon finding the agent provocateur unworthy of any credit as a witness. (paras 27-28)

(2) There was no merit in the argument that sub-s (2) of s. 40 of the DDA limits the category of agent provocateur only to a police and a customs officer under the DDA. Subsection (2) of s.40 of the DDA consists of two limbs. The words in the first limb are plain, clear and unambiguous and there is nothing in it that suggests it has reversed or limited the common law principle that any person can be an agent provocateur or that only a police or customs officer can be an agent provocateur under the DDA. The second limb of the subsection states that the law has to be complied with and denotes that the court no longer has any discretion to refuse admitting such statement in evidence. (paras 34-35)

Bahasa Malaysia *Translation Of Headnotes*

Hasil kerjasama antara Polis Malaysia dan sebuah agensi penguatkuasaan dadah di Amerika Syarikat ('DEA'), perayu telah ditangkap dan kemudiannya didakwa di bawah s. 39B Akta Dadah Berbahaya 1952 ('ADB') yang dibaca bersama-sama dengan s. 34 Kanun Keseksaan, bagi kesalahan mengedar 875.2 gram heroin. SP4, yang berkhidmat untuk DEA, memainkan peranan penting dalam penangkapan perayu dengan bertindak sebagai ejen perangkap. Perayu telah disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Oleh itu, perayu merayu. Dalam rayuan

A ini, isu utama yang perlu diputuskan oleh mahkamah adalah berkenaan tafsiran s. 40A ADB dan khususnya, sub-s. (2). Peguam terpelajar bagi pihak perayu menegaskan bahawa hanya dua kategori ejen perangkap yang diiktiraf di bawah s. 40A(2) ADB dan mereka adalah pegawai polis dan kastam. Adalah dihujahkan
B bahawa SP4 tidak boleh menuntut manfaat di bawah s. 40A(2) ADB kerana identitinya dipersoalkan dan beliau juga bukan pegawai polis mahupun pegawai kastam di bawah maksud s. 40A(2) ADB.

C **Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)**
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

D **(1)** Subseksyen (1) di bawah s. 40 ADB berfungsi sebagai suatu variasi atau pengecualian. Ia adalah untuk menghapuskan atau mengurangkan kesan anggapan ketidakbolehpercayaan sebagai saksi terhadap ejen perangkap. Anggapan sedemikian sebaliknya boleh terpakai di bawah peraturan umum keterangan dan
E prosedur memandangkan beliau mungkin memainkan peranan dalam pelakuan kesalahan yang dipertikaikan. Tanpa subseksyen tersebut, hakim bicara mungkin akan mengecualikan keterangan sedemikian atas alasan ia memudaratkan tertuduh, atau jika diterima, beliau mungkin memberi sedikit atau tiada
F pertimbangan apabila mendapati ejen perangkap tidak layak menjadi saksi.

(2) Tiada merit dalam hujahan bahawa sub-s. (2) di bawah s. 40 ADB mengehadkan kategori ejen perangkap hanya kepada pegawai polis atau pegawai kastam di bawah ADB.
G Subseksyen (2) di bawah s. 40 ADB terbahagi kepada dua bahagian. Perkataan-perkataan dalam bahagian pertama adalah mudah, jelas dan tidak kabur dan tiada apa-apa di dalamnya yang menunjukkan bahawa ia telah mengakas atau mengehadkan prinsip common law bahawa mana-mana orang
H boleh menjadi perangkap atau bahawa hanya pegawai polis atau kastam sahaja yang boleh menjadi ejen perangkap di bawah ADB. Bahagian kedua subseksyen pula menyatakan bahawa undang-undang hendaklah dipatuhi dan memperuntukkan bahawa mahkamah tidak lagi mempunyai
I sebarang kuasa budi bicara untuk menolak pernyataan sedemikian dalam keterangan.

Case(s) referred to:
Brannan v. Peek [1947] 2 All ER 572 ***(refd)***
Cheng Swee Tiang v. PP [1964] 1 LNS 19 FC ***(refd)***
Cheong Seok Leng v. PP [1988] 1 LNS 39 HC ***(refd)***
Hazura Singh v. Emperor AIR [1929] Lah 436 ***(refd)***
How Poh Sun v. PP [1991] 1 LNS 16 CA ***(refd)***
Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***
Lian Teck Chew v. Regina [1955] 1 LNS 54 HC ***(refd)***
Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd & Ors [1962] AIR SC 1543 ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
R v. Sang [1980] AC 402 ***(refd)***
Re Lee Yoke Keng & Ors [1955] 1 LNS 120 HC ***(refd)***
Regina v. Loosely [2001] UKHL 53 ***(refd)***
Tan Weng Chiang v. PP [1992] 4 CLJ 2094 SC ***(refd)***
Teja Singh & Mohamed Nasir v. PP [1949] 1 LNS 96 HC ***(refd)***
Wan Mohd Azman Hassan v. PP [2010] 4 CLJ 529 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39B(2), 40A(1), 40A(2)
Penal Code, s. 34

Police and Criminal Evidence Act 1984 [Eng], s. 78

Other source(s) referred to:
United Kingdom's *Report of the Royal Commission on Police Powers and Procedure [1929] Cmd 3297*

For the appellant - Hisyam Teh Poh Teik (Rajpal Singh & Salim Bashir with him); M/s Teh Poh Teik & Co
For the respondent - Nurulhuda Mohd Noor DPP

[Appeal from Court of Appeal; Criminal Appeal No: W-05-351-2009]

Reported by Najib Tamby

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

[1] Briefly, the appellant and one Sajan Gurung (2nd accused) were charged together for trafficking dangerous drug, namely, 875.2 grams of heroin, an offence under s. 39B of the Dangerous

Drugs Act 1952 ('DDA') read together with s. 34 of the Penal Code. They were alleged to have committed the offence on 30 May 2003 at about 2pm in Room No. 1109, Federal Hotel, Jalan Bukit Bintang, in the District of Dang Wangi, Federal Territory of Kuala Lumpur. Their arrest can be aptly described as a result of a 'sting operation' conducted by the Malaysian Police in close cooperation with the United States Drugs Enforcement Agency ('DEA').

[2] They were both convicted and sentenced to death as mandated under s. 39B(2) of the DDA by the High Court. Both appealed to the Court of Appeal against the convictions and sentences imposed. Unfortunately, the 2nd accused passed away pending the hearing of his appeal. The appellant was therefore left alone to prosecute his appeal. It was subsequently dismissed. He now appeals to this court.

[3] In his Petition of Appeal and in the written submission filed with this court several grounds of appeal were submitted and canvassed for consideration. However, during the hearing learned counsel for the appellant in his oral submission focused on one main point of law, that is, the interpretation of s. 40A of DDA ('the section') and in particular sub-s. (2) thereof.

[4] The section reads:

> Section 40A. Evidence of agent provocateur admissible.
>
> (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
>
> (2) Notwithstanding any rule of law of the provisions of this Act or any written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

[5] In this case it is not in dispute that the agent provocateur Mr Mensah Marlon Carl (SP4) who was based in Bangkok and worked for DEA played a key role that led to the arrest of the appellant and the 2nd accused by the Malaysian Police. SP4 went by the name of 'James' when dealing with the appellant and those connected in procuring and delivering the prohibited substance. Their several meetings and rendezvous had been well rehearsed by the Court of Appeal in its judgment. We need not repeat them.

[6] Further, in view of the specific issue raised before us it is not essential for the purpose of this judgment to narrate in any detail the facts and circumstances leading to the prosecution of the appellant and the 2nd accused.

[7] The gist of the submission of learned counsel for the appellant raised for the first time in this appeal is that in view of the words of sub-s. (2) of the section only a police officer or a customs officer can be an agent provocateur under the DDA.

[8] Learned counsel submitted thus:

> It is respectfully submitted that subsection (1) of the provision deals with the issue of credibility whilst subsection (2) deals with the issue of admissibility.
>
> This ground of appeal relates to the construction of section 40A(2) of the Act. It appears and there is basis to suggest that only two categories of agent provocateurs are recognized under section 40A(2), and they are police officers and customs officers.
>
> SP4 is neither a police or customs officer within the meaning of section 40A(2) and as such cannot claim benefit to section 40A(2). In fact, SP4's identity is suspect for the following reasons:
>
> (i) he had no identification papers with him (pg. 89 of the Appeal Record Vol. 1);
>
> (ii) he is a marketing manager in Ghana with no proper address.
>
> The identity issue was submitted by counsel at the end of the case for the prosecution (see pg.172 of the Appeal Record Vol. 2).
>
> Because section 40A(2) cannot be called in aid by SP4 all alleged statements that were said to have been made by the Appellant are therefore inadmissible. Without these statements there is no credible evidence of direct evidence of trafficking.

[9] In response, the learned Deputy Public Prosecutor argued that the 'scheme of the DDA itself will show that drug trafficking is a global issue originating from various International Conventions. Equally, the definition of trafficking includes importing, exporting, transporting. Such being the case, the role of an agent provocateur rightly so from the absence of a definition to the word 'police officer' thus envisages the intention of the legislature to cater for such situation, which would include the collaboration of an agent from other law enforcement. Such being the case, PW4 is an agent provocateur working in collaboration with our police and equally is protected by our s. 40A DDA.'

[10] With due respect, we are of the view that on the one hand the interpretation given by learned counsel for the appellant to sub-s. (2) is misconceived while on the other, the learned Deputy Public Prosecutor failed to appreciate its significance.

[11] In our view, in order to better understand sub-s. (2), it is necessary to revert to some basic principles or canons of statutory interpretation.

[12] Firstly, the object of statutory interpretation is to determine what the words of a statutory provision mean. It may be, *inter alia*, either by way of strict literal meaning, ordinary and natural meaning, the golden rule, the purposive approach (mischief rule), the value-based approach or the *ejusdem generis* rule.

[13] Secondly, where the words are unambiguous, plain and clear they must be given their natural and ordinary meanings. 'It is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral' (See: *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82; *Tan Weng Chiang v. PP* [1992] 4 CLJ 2094). Further, it should be borne in mind the "dictum that one should not 'twist and outstretch the language beyond its common usage'", (See: *Cheong Seok Leng v. PP* [1988] 1 LNS 39).

[14] Thirdly, 'that the words used in a section must be given their plain grammatical meaning'. It is also an important rule that a statute should be construed as a whole. *Where the court is dealing with two sub-sections of a section, 'it is necessary that the two sub-sections must be construed as a whole "each portion throwing light, if need be, on*

the rest." The two subsections must be read as parts of an integral whole and as being inter-dependent.' It is not legitimate for the court to rewrite the subsections. (emphasis added). (See: *Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd & Ors* [1962] AIR SC 1543; *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79).

[15] Fourthly, 'that not just a single rule of interpretation should be contemplated, pursued and employed in interpreting any statute to the exclusion of all others; one should test the said single rule with other rules and general presumptions wherever appropriate.' (See: *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559).

[16] Fifthly, that in interpreting a penal provision any doubt therein should be given to the accused person.

[17] Reverting now to the case at hand the starting point is to consider the judicial pronouncement of who is an agent provocateur. It is 'one who provokes or suggests the commission of an offence to another person hoping that the latter will go along with his suggestion so that the other person may be convicted of the offence the agent provocateur suggested'. (See: *Wan Mohd Azman Hassan v. PP* [2010] 4 CLJ 529).

[18] In other words "a person who entices another to commit an express breach of the law which he would not otherwise have committed, and then proceeds or informs against him in respect of such offence." (See: United Kingdom's *Report of the Royal Commission on Police Powers and Procedure* [1929] Cmd 3297).

[19] Thus, it denotes that any person can be an agent provocateur and need not be only a class or category of persons or members of a law enforcement agency. But more often than not an agent provocateur is generally 'an agent of the state - usually a law enforcement officer or a controlled informer' who 'causes someone to commit an offence in order that he should be prosecuted' per Lord Hoffmann, para. 35 in *Regina v. Loosely* [2001] UKHL 53.

[20] And it is on account of being an enforcement officer or a controlled informer that the practice of relying on the evidence of an agent provocateur by the prosecution has been frowned upon in several jurisdictions such as Canada, the United States of America, and depending on factual consideration, in the United Kingdom. There are few reasons for such judicial disapproval.

[21] Lord Nicholls of Birkenhead in *Loosely*'s case *(supra)* said this at para. 1:

> Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen. (emphasis added).

[22] Having said the foregoing Lord Nicholls went on to express the realities on the ground. This is how he put it at paras. 2, 3 and 25:

> 2. ... The difficulty lies in identifying conduct which is caught by such imprecise words as lure or incite or entice or instigate. If police officers acted only as detectives and passive observers, there would be little problem in identifying the boundary between permissible and impermissible police conduct. But that would not be a satisfactory place for the boundary line. Detection and prosecution of consensual crimes committed in private would be extremely difficult. Trafficking in drugs is one instance. With such crimes there is usually no victim to report the matter to the police. And sometimes victims or witnesses are unwilling to give evidence.
>
> 3. Moreover, and importantly, **in some instances a degree of active involvement by the police in the commission of a crime is generally regarded as acceptable**. (emphasis added).
>
> 25. Ultimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute.

[23] One of the underlying principles gleaned from the foregoing extract of the speech of Lord Nicholls is that it is a matter of discretion for a trial judge to consider and exercise when confronted with evidence of an agent provocateur.

[24] The other common arguments or reasons against relying on the evidence of an agent provocateur are that:

i. 'the state should not instigate the commission of criminal offences in order to punish them';

ii. 'it is not to tempt people to commit crimes in order to expose their bad characters and punish them';

iii. 'to allow policemen or controlled informers to undertake entrapment activities unsupervised carries great danger, not merely that they will try to improve their performances in court, but of oppression, extortion and corruption';

iv. it compromises 'the integrity of the judicial system';

v. it is unfair;

vi. 'it is necessary to balance the competing requirements that those who commit crimes should be convicted and punished and that there should not be an abuse of process which would constitute an affront to the public conscience. In carrying out this balancing exercise it will be necessary for the court in each individual case to take into account a number of factors';

vii. it is 'a violation of the concept of fairness "if a defendant were to be convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurised or wheedled into committing it by a law enforcement officer';

viii. 'a prosecution would be "an affront to the public conscience"'; or

ix. it is "deeply offensive to ordinary notions of fairness".

[25] Be that as it may it should nevertheless be understood that when an agent provocateur is called upon to testify in court he is just another witness and his evidence is therefore subject to the general rules of evidence and procedures, both statutory and common law.

[26] Meanwhile, when in a particular statute it is provided for a manner in approaching certain category of evidence or witness then such a provision is a variation or exception to the general rules of evidence and procedure.

[27] Thus, subsection (1) of the Section is there as a variation or exception. It is to remove or minimize the impact of the presumption of credit unworthiness as a witness against an agent provocateur. Such presumption could otherwise be invoked under the general rules of evidence and procedure in view of the role that he might have played in the commission of the offence in question. (See: *Hazura Singh v. Emperor* AIR [1929] Lah 436).

[28] Further, without the subsection it may also be a basis for a trial judge to exclude such evidence on the ground of it being prejudicial to the accused, or even if admitted, he may give no or little weight to the evidence upon finding the agent provocateur unworthy of any credit as a witness. (See: *Brannan v. Peek* [1947] 2 All ER 572).

[29] We now turn to sub-s. (2). The question is whether it has a similar effect by way of limiting who can be an agent provocateur under the DDA. In construing this subsection it is in the forefront of our minds the principles or canons of statutory interpretation as discussed above.

[30] To begin it needs to be noted that under common law any person can be an agent provocateur. There is no requirement that he or she must be a law enforcement officer.

[31] Further, in law, an agent provocateur is not considered an accomplice thus his evidence requires no corroboration. (See: *Teja Singh & Mohamed Nasir v. PP* [1949] 1 LNS 96 (HC); *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 (SC)).

[32] Now, on plain reading of sub-s. (2) we find that it consists of two limbs.

[33] The first limb of the subsection is the overriding clause that deals with two situations and it is to be read in this way:

Regardless of ('Notwithstanding'):

i. 'any rule of law of the provisions of this Act or any written law to the contrary' (first situation); 'and'

ii. even when '(that) the agent provocateur is a police officer whatever his rank or any officer of customs' (second situation), A

the second limb of the subsection must be complied with.

[34] There is nothing in this first limb to suggest that it has reversed or limited the common law principle that any person can be an agent provocateur and that henceforth only a police or a customs officer can be an agent provocateur under the DDA. All it does is to highlight a situation (second situation) that even when an agent provocateur is a police or customs officer any statement, made to him by any person shall be admissible as evidence. The court has no discretion to refuse admitting (as opposed to weight) such evidence. B C

[35] If Parliament had intended to limit the category of an agent provocateur under the DDA as argued it would have made it in plain simple term and such provision would have preceded sub-s. (1) of the Section. In fact we find the words in the first limb of sub-s. (2) of the section to be plain, clear and unambiguous and do not entertain any doubt for the benefit of the appellant. D E

[36] Bearing therefore in mind that 'it is necessary that the two subsections must be construed as a whole "each portion throwing light, if need be, on the rest." And that the two sub-sections must be read as parts of an integral whole and as being interdependent' we are of the view that the provision makes it only clear and avoids any doubt that it is not a bar to admit any statement made by a person to an agent provocateur who happens to be a police or a customs officer. F

[37] Without the overriding clause objection could be raised to exclude such statement on the ground of, *inter alia*, prejudicial effect outweighing its probative value, unfairness, abuse of state or executive power and abuse of the court process. (See: *Loosely*'s case *(supra)*). G H

[38] The second limb of the subsection states the law that has to be complied with, that is, 'any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial'. (emphasis added). It should be noted that it refers to 'admissibility' as opposed to 'weight' to be given to such evidence. I

[39] The emphasized phrase denotes that the court has no longer any discretion to refuse admitting such statement in evidence. This is in line with the principle enunciated in *R v. Sang* [1980] AC 402; *How Poh Sun v. PP* [1991] 1 LNS 16; *Re Lee Yoke Keng & Ors* [1955] 1 LNS 120 (HC); *Lian Teck Chew v. Regina* [1955] 1 LNS 54; *Cheng Swee Tiang v. PP* [1964] 1 LNS 19).

[40] Incidentally, in England the decision in *Sang*'s case *(supra)* 'on the admissibility of evidence obtained unfairly has been reversed by Parliament, by s. 78 of the Police and Criminal Evidence Act 1984. Under s. 78 the court now has power to exclude evidence on which the prosecution proposes to rely if, having regard to all the circumstances, the court considers the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. The circumstances to which the court is to have regard include, expressly, the circumstances in which the evidence was obtained', per Lord Nicholls of Birkenhead in *Loosely*'s case *(supra)* at para. 11.

[41] Accordingly for the reasons above we find no merit in the submission of learned counsel for the Appellant that sub-s. (2) has limited the category of agent provocateur only to a police and a customs officer under the DDA.

[42] We have also considered the other grounds submitted for the Appellant in this appeal although not pursued by his learned counsel during oral submission. However, we are not persuaded by them so as to change our unanimous view that this appeal should be dismissed.

[43] This appeal is therefore dismissed. We hereby affirm the conviction as found and the sentence imposed by the Courts below.